Filed 4/8/09 P. v. Gutierrez CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAMON GUTIERREZ, Defendant and Appellant.	B206544 (Los Angeles County Super. Ct. No. BA317512)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant Ramon Gutierrez was charged by information with robbery (Pen. Code, § 211, count 1), possession of narcotics for sale (Health & Saf. Code, § 11351.5, count 2), possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1), count 3), criminal threats (Pen. Code, § 422, count 4) and assault (Pen. Code, § 245(b), count 5).[1] The information also charged that all five counts were committed for the benefit of, at the direction of and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(A), (b)(1)(B) and (b)(1)(C).[2]

B. *Evidence at Trial*

On February 18, 2007, shortly after midnight, Freddy Correa, the victim, was attempting to park his car, when a red Honda Prelude pulled alongside him. There were two Hispanic males inside the Honda. Both had shaved heads. The driver had numerous tattoos. Appellant, seated in the passenger seat, asked Correa where Correa was "from." After Correa responded "nowhere," appellant and the

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[1] Unless otherwise specified, statutory references are to the Penal Code.

[2] With respect to count 1, it was further alleged that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b). With respect to counts 1, 4 and 5, it was alleged that appellant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a). With respect to count 2, it was alleged that appellant was personally armed with a firearm within the meaning of section 12022, subdivision (c). Finally, the information alleged that appellant had suffered a prior conviction within the meaning of section 667.5, subdivision (b) and a prior serious or violent felony or juvenile adjudication within the meaning of section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i). During trial, the parties stipulated that appellant was a convicted felon.

driver got out of the Honda. Both pointed handguns at Correa. The driver demanded that Correa hand over his cell phone, iPod and money. When Correa said he had no money, the driver said: "Just give me your fucking money, or we are going to kill you" and "[I]f we search the car and we find any money, we are going to kill you." When Correa looked in the direction of the driver, the driver said: "If you look at me one more time, I'm going to kill you." At some point, appellant also said: "If you look at us, we are going to kill you." Correa gave the driver his wallet, cell phone and iPod. As appellant and the driver prepared to leave, the driver again said that if Correa looked at them, they would kill him.

Approximately ten minutes after the robbery, Correa called 911 from his home phone. Approximately 30 minutes later, he was taken to a location and made a field identification of appellant. He was also shown his cell phone and iPod, which he identified as belonging to him. He never recovered his wallet.

At 12:30 a.m., shortly after Correa was robbed and in the same general area, Officer Jose Sanchez of the Los Angeles Police Department and his partner attempted to detain a red Honda Prelude for a traffic violation by activating their patrol vehicle's red lights. Two Hispanic males with shaved heads were inside the Honda. The Honda did not stop. Officer Sanchez continued to follow the Honda and noticed an item being thrown from it. Numerous other officers soon joined the pursuit.

Eventually, the Honda crashed into a telephone pole and the two occupants got out and ran. Officer Sanchez chased and caught the passenger -- appellant -- and after searching his pockets, found two cell phones and numerous small packages wrapped in plastic wrap and aluminum foil containing a substance that

looked like cocaine.[3] Other officers found an iPod in the front passenger seat of the Honda and two semiautomatic handguns along the route the Honda had taken during the police pursuit.

C. *Gang Evidence*

Officer Joseph McDowell of the Los Angeles Police Department, the prosecution's gang expert, testified that in 2007, after receiving specialized gang training, he was assigned to the Echo Park Gang (EPG), a primarily Hispanic gang which got its start in the 1950's. Officer McDowell learned about gang culture from his training officer, other senior officers who were gang experts and conversations with gang members. He also reviewed station files and viewed documentaries on gang life.

According to Officer McDowell, EPG "controls" the area between Riverside Drive, the 101 Freeway, Glendale Boulevard and Elysian Park; it has a common sign or symbol; and its primary activities include murder, assault, drive-by shootings, robberies, drug sales, kidnapping, extortion, witness intimidation and vandalism.[4] The sale of drugs in particular is an important gang activity because it provides monetary support for the gang. Robberies are important to gangs because they demonstrate to residents of a gang's territory that gang members are not afraid to take what they want from anyone. Intimidation of witnesses is important because it helps a gang "control[]" an area.

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[3] A police chemist testified that the substance in the packages was cocaine. An officer with expertise in narcotic sales described the packages as "$20 bindles" and opined that that they were possessed for the purposes of sale.

[4] The Correa robbery was not committed within EPG territory; it was committed just outside EPG territory, in the territory of a rival gang.

Officer McDowell noted that two of appellant's tattoos referred to EPG, specifically, "Echo Park" tattooed on his back and the letters "EP" tattooed on his arms. In Officer McDowell's opinion, it was unlikely that a non-member would sport the tattoo of a particular gang because members would view the presence of gang tattoos on a non-member as a basis for physical assault. Officer McDowell was not personally familiar with appellant, but concluded from the presence of the tattoos that appellant was a member of EPG.

Officer McDowell was asked a hypothetical based on the facts of the case as attested to by Correa and the other percipient witnesses -- two Hispanic men with shaved heads, armed with semiautomatic handguns, one of whom has numerous bindles of cocaine in his possession and EPG tattoos, approach a victim in his car, ask him where he is from, point guns at him, take his property, threaten to kill him, and then flee. Officer McDowell opined that the criminal acts in the hypothetical were committed for the benefit of and furtherance of EPG. In reaching this conclusion, he focused primarily on the following factors: the phrase "where are you from" is a typical gang question and is used to instill fear in non-members; gang members carry guns to control their neighborhoods and to commit robberies; and narcotics are a source of revenue for gangs. Officer McDowell further explained that gang members commit violent crimes as a way to gain status. In addition, gang members travel outside their territory looking for rival gang members to assault. Additional status may be gained by committing a crime in a rival's territory.

During his testimony, Officer McDowell identified certified copies of convictions in two criminal cases, case no. BA294857 and case no. GA065519. In case no. BA294857, the defendant, Felix Delgado, was convicted of carrying a loaded gun and car theft. The conviction occurred in 2006. Case no. GA065519 involved a 2006 conviction for carjacking. The defendant was Drew William

Leighton, Jr. The prosecutor asked: "Have you spoken with other gang officers about Mr. Felix Delgado?" Officer McDowell responded in the affirmative. He was then asked: "[I]s Mr. Delgado a member of the Echo Park Gang?" He again responded affirmatively. Identical questions were asked concerning Leighton, and Officer McDowell responded affirmatively to those questions as well. Officer McDowell was asked whether he had an opinion as to whether the crimes involved were gang-related. He stated that he did and that they were.[5] He based his opinion on both the conversations with other officers and his review of the police reports. On cross-examination, defense counsel elicited the information that Officer McDowell had had no personal contact with Delgado or Leighton. Officer McDowell reiterated that he based his conclusions on conversations with fellow officers and his own review of the police reports.

D. *Defense Motion for Entry of Judgment*

After the close of evidence, defense counsel moved under section 1118.1 for entry of judgment of acquittal based on insufficient evidence. Counsel did not argue the motion or highlight any specific charge that should be dismissed. The court denied the motion, finding there was "substantial evidence to support a conviction on each one of the charged offense and a true finding on each and every one of the allegations," and that " [a] reasonable jury could . . . convict [appellant] of each and every one of the crimes and find true each and every one of the allegations."

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[5] The prosecutor initially asked whether both prior crimes were committed in the furtherance of a gang and defense counsel objected based on lack of foundation. The court sustained the objection. The court also sustained an objection to whether the officers involved in those two cases expressed the opinion that the crimes were gang-related. After sustaining the latter objection, the court stated: "You can call upon the witness to offer his opinion, if he has one."

E. *Verdict and Sentence*

The jury found appellant guilty on all five counts and found true all of the special allegations, including the gang allegation. Appellant admitted the prior convictions.

The court imposed the following sentence: (1) on count 1, 30 years, consisting of the upper term of five years, doubled, plus 10 years each for the section 12022.53, subdivision (b) and section 186.22, subdivision (b)(1) allegations; (2) on count 2, a concurrent sentence of 18 years, consisting of the middle term of five years, doubled, plus four years each for the section 12022.53, subdivision (b) and section 186.22, subdivision (b)(1) allegations; (3) on count 3, nine years, consisting of the upper term of three years, doubled, plus three years for the section 186.22, subdivision (b)(1) allegation; (4) on count 4, a concurrent sentence of 14 years, consisting of the upper term of three years, doubled, plus three years for the section 12022.53, subdivision (b) allegation and five years for the section 186.22, subdivision (b)(1) allegation; (5) on count 5, 26 years, consisting of the the middle term of six years, doubled, plus four years for the section 12022.53, subdivision (d) allegation and ten years for the section 186.22, subdivision (b)(1) allegation.[6]

DISCUSSION

Appellant contends that there was insufficient evidence to support the section 186.22, subdivision (b)(1), gang enhancement. For the reasons discussed, we disagree.

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[6] The sentences imposed for counts 3 and 5 were stayed pursuant to section 654.

A. *Standard of Review*

In reviewing a challenge based on sufficiency of the evidence, we view the record in the light most favorable to the judgment and determine whether the decision is supported by evidence which is reasonable, credible, and of solid value. (*People v. Morales* (1992) 5 Cal.App.4th 917, 925.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support [the verdict]," the reviewing court will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

B. *Section 186.22 Requirements*

Section 186.22, subdivision (b)(1), the provision under which appellant was charged "is a part of the California Street Terrorism Enforcement and Prevention Act of 1988, also known as the STEP Act. [Citations.] The statute was a legislative response to the increasing violence of street gang members throughout the state." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 435.) The requirements for establishing a section 186.22, subdivision (b)(1) gang enhancement are set forth in the provision: "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . by an additional term of two, three, or four years at the court's discretion." Section 186.22 defines "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or

more of [certain specified] criminal acts . . . , having a common name or common indentifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) "Pattern of criminal gang activity" is defined to mean "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain specified] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons."[7] (§ 186.22, subd. (e).)

Summarizing the statutory requirement, the Supreme Court stated in *People v. Gardeley* (1996) 14 Cal.4th 605: "[T]o subject a defendant to the penal consequences of [section 186.22, subdivision (b)(1) of] the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.]" (*People v. Gardeley, supra,* 14 Cal.4th at pp. 616-617.) In addition, "the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate

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[7] The specified offenses include: assault with a deadly weapon or by means of force likely to produce great bodily injury, robbery, homicide, manslaughter, intimidation of witnesses, sale or possession for sale of controlled substances, grand theft and carjacking.

offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*People v. Gardeley*, *supra*, at p. 617, italics omitted.)

C. *Evidence Supporting Gang Enhancement*

Appellant attacks only one aspect of the evidence presented below, contending that it did not support that EPG engaged in the requisite "pattern of criminal gang activity" because Officer McDowell's testimony concerning the gang status of the perpetrators of the predicate acts -- the 2006 offenses committed by Delgado and Leighton -- was hearsay.

As respondent points out, appellant forfeited that contention because he failed to object to Officer McDowell's testimony concerning the gang membership of Delgado and Leighton.[8] It has long been the rule that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion" (Evid. Code, § 353, subd. (a)) and that "[h]earsay evidence which is adduced without objection may properly be considered in support of a judgment of conviction" (*People v. Murray* (1955) 135 Cal.App.2d 600, 603). More recently, the Supreme Court refused to consider whether a judgment of conviction offered to prove that the defendant's gang engaged in a pattern of criminal activity contained

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[8] Not only did counsel fail to object, but during a later discussion outside the presence of the jury, defense counsel stated: "I understand the People intend on calling an additional gang expert this morning. I would object to that . . . as it is cumulative. I think the gang officer testified to everything that he needed to testify to yesterday. I haven't received any additional discovery as to what this additional gang expert is going to testify to." Following counsel's statement, the prosecutor responded: "I don't plan on calling an additional gang expert."

inadmissible hearsay because "[the] defendants raised no hearsay objection to this documentary evidence [at trial]." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 11; see *People v. Riel* (2000) 22 Cal.4th 1153, 1185 [defendant could not challenge admissibility of evidence on appeal when "he did not object to [the] evidence at trial" and "indeed, . . . elicited some of it himself"].)

Moreover, even were we to consider the contention on its merits, we would reject it. The opinion of a police officer testifying as a gang expert "may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Ibid*.) "And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) The Supreme Court recognized that the result of permitting an expert to explain the basis for his or her opinion "'is that often the expert may testify to evidence even though it is inadmissible under the hearsay rule.'" (*Id.* at p. 619.)

Following *Gardeley*, appellate courts have specifically held that in reaching a conclusion concerning whether an individual is a member of a particular gang, the gang expert may rely, at least in part, on the reports of others more familiar with the individual. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331 [expert's opinion that defendant was member of King Kobras properly based on report from detective who interviewed defendant, review of booking photos that showed defendant's "VKKR" and "KK" tattoos, and fact that crime allegedly

committed was a primary activity of King Kobras and defendant's companion was member of King Kobras]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1205-1206, 1210 [expert properly based opinion that defendant was member of EYC gang on conversations with other EYC members, conversations with rival gang members, defendant's tattoos and defendant's association with known EYC members]; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464 [holding that "an individual's membership in a criminal street gang is a proper subject for expert testimony" and that "a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies"].)

Appellant contends the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 mandates a different result because he had no opportunity to cross-examine the officers who discussed the Delgado and Leighton cases with Officer McDowell.[9] As explained in *People v. Thomas*, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the material on which the expert bases his or her opinions are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" (*People v. Thomas, supra,* 130 Cal.App.4th at p. 1210, quoting *Crawford v. Washington*,

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[9] *Crawford* essentially held that out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused had a prior opportunity to cross-examine him or her.

supra, 541 U.S. at p. 59; accord, *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

Appellant alternatively contends that Officer McDowell's testimony concerning the predicate acts that supported EPG's "pattern of criminal activity" was insufficient for the reasons discussed in *In re Leland D.* (1990) 223 Cal.App.3d 251 and *In re Nathaniel C.* (1991) 228 Cal.App.3d 990. Those cases are inapposite. In *Leland D.*, the gang expert initially testified that members of the defendants' gang had engaged in the sale of rock cocaine, and had committed vehicle thefts and assaults. However, on closer examination, he admitted he had no specific knowledge of who in the gang committed such offenses and "when, where and under what circumstances" they occurred. (*In re Leland D., supra,* 223 Cal.App.3d at p. 259.) In addition, "[t]he sources of [his] conclusional pronouncements appear[ed] to have been hearsay statements from unidentified gang members and information pertaining to arrests of purported gang members all made without a definite timeframe being established." (*Ibid.*) Stressing that "[e]vidence that an individual has been arrested for an offense, without more, is not sufficient to establish either that a crime has been committed or that any particular individual is guilty of its commission," the court concluded that the expert's testimony "f[ell] far short of what is required to prove 'the commission, attempted commission, or solicitation of two or more of the [statutorily enumerated] offenses' (§ 186.22, subd. (e)) within the requisite three-year time period . . . ." (*In re Leland D.*, at pp. 258, 259-260.)

In *Nathanial C.*, the prosecution similarly attempted to establish that the defendant's gang had committed two predicate offenses by introducing evidence of the crimes themselves rather than proof of prior convictions. The gang expert on whom the prosecution relied to establish one of the predicate acts -- the shooting of a fellow gang member -- had no personal knowledge of it, and the perpetrator had

never been positively identified. In an attempt to establish the predicate offense, the expert merely repeated what investigating officers believed concerning who had perpetrated the shooting and why it had occurred. The court concluded that "[s]uch vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred." (*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 1003.)

Here, the actual convictions of Delgado and Leighton for the enumerated offenses within the requisite timeframe were established by certified copies of the convictions themselves. With respect to the predicate act element of the gang enhancement, the only question remaining was whether Delgado and Leighton were members of EPG. Officer McDowell offered his opinion that they were, and testified that his opinion was based on conversations with officers more familiar with those defendants and on his own review of the police reports related to the crimes. Information describing the perpetrators and the facts underlying the offenses would have been readily available in the contents of the police reports, and either side was free to inquire further as to the basis of Officer McDowell's opinion concerning the perpetrators of the predicate offenses. That neither side availed itself of that opportunity does not render Officer McDowell's testimony incompetent.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.